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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 695

ABRAHAM CHAIFETZ, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO MEMORANDUM FOR THE UNITED STATES

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY TO MEMORANDUM FOR THE UNITED STATES

Since the Government confesses error on Count IV and agrees that certiorari should be granted as to that count so that it may be REVERSED (Mem. p 18-19), petitioner answers the Memorandum filed by respondent and prays that he be permitted to show why this confession of error on Count IV requires a review of Count III, the felony conviction.

The respondent's tactics may be compared to the "sacrifice play" in the game of baseball. Here the government is willing to "sacrifice" an admittedly erroneous conviction on Count IV if it can save and uphold the conviction on

Count III which petitioner contends is also erroneous, and would ruin the life of petitioner, a Member of the Bar, if allowed to stand.

I

THE GOVERNMENT FAILED TO PROVE A NET WORTH CASE

Respondent states (Mem. 7) that the government introduced evidence "to establish annual increases in petitioner's net worth, and that these increases represented current taxable income". The government's starting point omitted cash on hand of $20,000 at the end of 1950, and other assets of $15,172.50 or a total of $35,172.50, which more than accounts for the alleged increase in net worth through December 31, 1953.

Respondent then discusses (Mem. 7, 8) ITS evidence relating to cash on hand, but completely ignores the overwhelming evidence adduced by petitioner, AND BELIEVED AND ACCEPTED BY THE JURY, as evidenced by petitioner's acquittal for 1951, 1952, 1954 (as to the felony of tax evasion), and 1955.

Respondent also discusses some evidence as to the loans receivable by petitioner at the end of 1950. For example, they say "Nothing could be found to substantiate the alleged $3,000. loan to Robert M. Johnson" but they completely ignore the overwhelming evidence produced by petitioner, from live witnesses and documentary exhibits, which established the loans receivable, including the testimony from Adele Johnson, a registered nurse, widow of Robert Johnson, describing the circumstances of the $3,000. loan and how it was repaid, and describing the cash box of petitioner, from which the loan was made. Even more significant is the fact that leads as to all these loans receivable were given to the government during its investigation, including the name and address of Robert Johnson and the others, but that the agents FAILED TO RUN DOWN THESE LEADS. (Record pages cited on page 7 herein).

How the government can recite its repudiated and rejected evidence as supporting the conviction for 1953, is beyond the comprehension of petitioner.

Respondent refers (Mem. 9) to the "alleged cash gift of $9600, received by petitioner from his father in 1953 (to cover the cost of the father's funeral and tombstone and to support his widow), but it must be pointed out that NOWHERE did petitioner describe the funds received from his father as a GIFT. Petitioner treated it as a liability, being a fund held in escrow.

Respondent however persists in describing these funds as a gift.

Govt. Agent Hein testified (R. 354-5) that he was sure appellant had received this money, but claimed it was a gift. Hein also admits that if petitioner got this money, "it would reduce the taxable income for that year" (1953) (R. 355)

Also, petitioner produced witnesses who had personal knowledge of petitioner's receipt of $9600. from his father in 1953 for the purposes indicated, and that petitioner paid the funeral, tombstone and other expenses and supported his mother from the funds. (R. 356)

Notwithstanding his own admissions and the evidence shown, Agent Hein, whose testimony was shown to be biased, unreliable and untrue in many material respects, refused to list this item as a liability for 1953 in computing petitioner's net worth, and treated the $9600. as current taxable income.

However, since the govt's net worth computation (G. Ex. #66) claimed an alleged increase in net worth for the three year period ending December 31, 1953, of $33,000. and this computation omitted $20,000. cash on hand over $15,000. in loans receivable, and other assets, the assets erroneously omitted at the opening substantially accounted for the

alleged increase in net worth and it is therefore unnecessary to include the $9600 received from his father, in reversing the conviction for 1953.

Coupling the affirmative proof as to CASH ON HAND AND LOANS RECEIVABLE, which were ACCEPTED and obviously believed by the jury, with the government's failure to run down leads given by petitioner during the investigation as to these additional assets, there was a complete failure of proof to establish a "net worth" tax evasion case *ab initio* or to support a conviction on Count III for 1953, under the net worth theory.

Respondent states (Mem p. 10) that the agents' investigation "was extensive; that the leads and explanations furnished by petitioner were either false or, if true, would have no substantial relevance to the issue of the amount of unreported income for 1953". The record shows that the agents ADMITTED THEIR FAILURE TO RUN DOWN LEADS FURNISHED BY DEFENDANT, and the "substantial relevance to the issues" is established by the jury's acquittal for 1951, 1952, 1954 and 1955 of the charge of tax evasion. For 1953, petitioner was convicted only because of omitted "specific items".

II

DEFENDANT WAS CONVICTED FOR 1953 (COUNT III) ON A SPECIFIC ITEM BASIS ALTHOUGH COURT HAD RULED THAT DEFENDANT COULD NOT BE CONVICTED ON A SPECIFIC ITEM BASIS. COURT FAILED TO INSTRUCT JURY THAT DEFENDANT COULD NOT BE CONVICTED ON A SPECIFIC ITEM BASIS ONLY

Although 1953 had the most specific items, (20 out of 42 over the five year period), petitioner denied any "wilfulness" in not entering the omitted fees in his fee book, and established that all but $313.30 of the omitted fees were deposited in his check account and identified by name in his check book record which, together with his fee book, constituted petitioner's entire bookkeeping system. Respond-

ent states that it introduced evidence of specific items only to show "Willfulness"; petitioner does not complain of the *admission* of this evidence. Petitioner urges that before the issue of wilfulness can arise, the government must first show, in a net worth case, an INCREASE in net worth due to current taxable income. In other words, if no increase in net worth has been established, the issue of wilfulness cannot arise, and a conviction based only on the omitted specific items cannot be upheld.

In this case, although from the beginning the government had described it as a "net worth case" and had justified its failure to furnish petitioner with a list of specific items on the ground that this was not a "specific item" case; and this was so held by Judge Team in denying a motion for a bill of particulars (R. 59); and although the trial judge had ruled that the Government was precluded from obtaining a conviction based only on the "specific items" (R. 293, 296-7, 303), the trial judge who had so ruled at the Bench, out of the hearing of the jury, FAILED TO INSTRUCT THE JURY THAT THEY COULD NOT CONVICT DEFENDANT BASED ONLY ON OMISSION OF SPECIFIC ITEMS unless it was first shown that there was a net worth increase on which tax was due.

This "PLAIN ERROR", consisting of a failure to properly instruct the jury on a crucial point,—made the instructions given "self-contradictory" and could only serve to confuse the jury. Had the jury been told that they could not convict for omission of specific items alone without a net worth increase; had they been instructed that if the government failed to establish a NET WORTH CASE for EACH YEAR, it would have been unnecessary to consider the specific items for any purpose and to acquit defendant; had the jury been told properly, the effect of the agents' failure to run down leads furnished by the defendant, petitioner contends that there would have been no conviction

for 1953. Other errors in instructing the jury (Pet. 37-41) are completely ignored by respondent, which alone require reversal of the conviction.

III

UNREASONABLE RESTRICTION ON NUMBER OF CHARACTER WITNESSES

This assignment of error is brushed off with a statement that, at first, the defense had agreed to 4 character witnesses. The Record shows conclusively that an objection to this ruling was noted and preserved by the defense. (R. 668-671) A right so valuable, in a case based solely on circumstantial evidence, inferred from arithmetical computations, cannot be so lightly tossed aside. A defendant's good character and unblemished reputation is valuable evidence, and where such evidence is unreasonably restricted to defendant's prejudice, as in this case, it warrants reversal.

IV

TRIAL COURT FAILED TO INSTRUCT JURY ON FUNDAMENTAL POINTS

Petitioner's attack on the instructions given by the trial court is discussed in paragraph 5 of the respondent's Memorandum (P. pp. 14-15) and lightly tossed aside with general statements to the effect that petitioner is not entitled to instructions in any particular form; that the charge as a whole must correctly and adequately cover the issues; and that some of the objections were not made at the trial. While it is true that some of the objections were not made at the trial, it is equally true and it is the law, under the plain error rule contained in Rule 52, F.R. Cr. P. that it is the duty of the court to instruct on all essential questions of the law, whether requested or not. *Screws v. U. S.*, 325 U.S. 91.

It was the duty of the Court to instruct the jury that they could not find the defendant guilty of tax evasion based on

omission of specific items. It was the duty of the Court to instruct the jury that if the government failed to establish a net worth case for each year, then they must acquit the defendant for any such year, and not consider any specific items. It was the duty of the Court to instruct the jury of the effect of failure to establish a net worth case, of the failure to run down leads; and to give a proper instruction on the lesser included offenses even though not requested by defendant in the proper form.

Thus, the jury should have been instructed that if the defendant did not commit the felony charged in 1951, 1952 and 1953, but "failed to supply information required by law" in those years, the jury must acquit because those years were barred by limitation.

The Court gave "self contradictory" instructions which while presumably correct as far as they went, nevertheless permitted the jury to convict based on omission of specific items alone, for the year 1953. The charge, read as a whole, does not meet the test and does not adequately and correctly cover these fundamental issues in the case. (See Petition pp. 33-41)

Although petitioner moved for judgment of acquittal at the close of all the evidence, based on the failure of the agents to run down the leads furnished them, and that the case should never have been submitted to the jury, the trial judge erroneously denied this motion and submitted to the jury the issue of whether the leads had been run down (R. 770-773), although the agents admitted their failure to run down the leads and there was no dispute on this point. (R. 241, 242, 267, 324, 325, 328-330; 332, 334, 335, 336, 337, 338, 340 to 345; 347-349; 354-355; 372-376; 400-401; 692, 723-724)

The Holland rule requires the trial judge to determine, as a matter of law, whether the government has established a net worth case and has run down the leads. Where, as

here, the government has failed in both respects, it is error for the trial judge to submit these issues to the jury as he did here. (R. 770-773) These crucial errors have been completely ignored or glossed over in respondent's memorandum.

The trial court failed to give any instruction on the lesser included offense for the years 1951, 1952, and 1953. In its Memorandum (P. 16-18) respondent says that the offense of "Failing to supply information" in violation of Section 7203 of the 1954 Code, (or Sect. 145-b-1939 Code) is not an offense "necessarily included in the offense charged", in Section 7201, previously Section 145-a.

Where a defendant is charged with attempting to evade or defeat payment of a tax, in some particular manner, such as here, "by filing a false and fraudulent return", then plainly, the failure to supply information is a lesser offense necessarily included in the greater. This is clearly shown by the detailed and well reasoned opinion in *McCue* v. *U. S.*, 160 F. Supp. 595, (D. Conn. 1958)

Respondent is compelled to contend that the lesser offense is not an offense included in the greater, because it knows that the lesser offense instruction was NOT GIVEN for 1953. It thus resorts to the sacrifice play, confessing error on Count IV, to try to uphold the erroneous conviction on Count III. Petitioner does not believe the Court will be fooled by this legal mumbo-jumbo.

On page 18 of its Memorandum, respondent cites the *Dillon* and *Janko* cases, (the latter now pending on certiorari), as supporting its statement that the crimes of omission set forth in Section 7203 are not included in the offense contained in Section 7201. THESE CITATIONS DO NOT SO HOLD AND DEAL WITH SECTION 7207 (formerly Sect. 3616-a of the 1939 code) which is not apropos.

In *Janko*, defendant was convicted of tax evasion by claiming allegedly false exemptions for his two minor

children whom he allegedly did not support to the extent of over 50%.

In *Jajko* as well as in *Dillon*, there was no evidence to show that the lesser offense contained in Section 7203 had been committed. - "Hence, the universal rule that it is not error to fail to instruct on an offense not presented by the evidence applies." *Jajko* v. *U. S.*, 281 F. 2d 156, at 164

These cases did not involve the "willful failure to supply information" offense, as was involved in *McCue* or in petitioner's case.

In the instant case, the trial Court held the lesser offense instruction was warranted by the evidence, and he did give this instruction for 1954 and 1955; the only reason he failed to give it for the earlier years, including 1953, was because it was barred by limitations.

Petitioner submits that under these circumstances, it was the duty of the trial court to instruct the jury that if the lesser offense had been committed in 1951, 1952 or 1953, and not the felony, it was their duty to acquit. This instruction was not given; the jury was not told what to do if they found only the lesser offense for 1953; there was no explanation to the jury for the different treatment given to the last two years.

As the *McCue* case points up, whenever a taxpayer files a false and fraudulent return, he fails to supply information; consequently it is a lesser included offense, and the instruction MUST be given whether requested or not. See Footnote 8 in the JAJKO case which is not contra to *McCue*—

V

OTHER FUNDAMENTAL ERRORS

In footnote 5 on page 12 of its Memorandum, respondent makes nothing of several fundamental errors committed by the trial Court, describing these contentions as "minor".

In Footnote 5(b) (Mem. 12) respondent states:

> "There is no merit in the argument that Rule 43, F.R. Cr. P. was violated because defendant was not personally present—He waived his rights under Rule 43 by voluntarily absenting himself after the trial had begun".

Petitioner was personally present at every stage of the trial in the Court room; petitioner was not at Bench Conferences or conferences which may have been held in chambers.

The incident here complained of occurred after the case had been submitted to the jury and while they were deliberating. The jury sent a note to the trial judge requesting an exhibit which had been marked "D. No. 60 for identification," but was not in evidence. Without reopening the Court, or sending for defendant, and without defendant's knowledge or consent, the trial judge sent a secret and untrue answer to the jury's request. (Pet. 42)

Petitioner was in the hall, in the Court room, or nearby at all times while the jury was deliberating, and never voluntarily absented himself as claimed by respondent. There is no basis in the Record for such a charge by respondent. There was a clear violation of Rule 43, F.R. Cr. P. by this occurrence, warranting reversal.

See: *McClanahan v. U. S.*, 272 F. 2d 663 (CCA-5-1959) (Cases cited in Petition, pages 42-44)

In Footnote 5(c), respondent brushes off another contention described as a "Minor" one: That a deputy marshal

made improper remarks to the jurors during the trial. (Pet. 44-46)

Respondent erroneously states as follows:

> "At the trial, defense counsel thrice told the judge he did not want the alleged incident considered and did not want any action taken thereon. (R. 813, 815, 816)"
> "The suggestion that the court, sua sponte, should have taken action overlooks the fact that no satisfactory showing of the circumstances surrounding the alleged incident was made."

—At the outset, the Record will show, beginning with page 815, that the misconduct of the deputy marshal was NOT brought to the attention of the trial judge "during" the trial as stated by respondent. The trial was concluded on November 24, 1959, when the jury brought in its verdict.

On December 16, 1959, at the argument of the Motion for New Trial etc., then Defense Counsel asked for and received permission to approach the Bench (R. 811). A Bench Conference then ensued out of the hearing of petitioner. Although petitioner ordered a transcript of that hearing, due to the resignation of the Court Reporter several days later, no such transcript was furnished to petitioner until the middle of March, 1960, when he first learned of the statements made by then defense counsel, who had been discharged prior to the time the appeal was noted on February 29, 1960.

The Bench Conference shows that a dispute had arisen between petitioner and his then defense counsel; that petitioner insisted that the misconduct of the marshal be brought to the attention of the trial judge (R. 811-819); that defense counsel wanted additional fees from petitioner before he would inform the court of the marshal's misconduct; that the trial judge did not ask petitioner what he wanted done; that the trial judge "white-washed" this severe charge against the deputy marshal assigned to his court by taking no action whatsoever. (See Pet. 44-46 for further elucidation of this grievous error).

CONCLUSION

Since the Government concedes that certiorari should be granted to reverse the erroneous conviction on Count IV, petitioner begs that the review also encompass the conviction on Count III which is so full of errors that it would be manifest injustice to permit it to stand. The Government's attempt to "footnote" the petitioner into prison by attempting to delude this Court into thinking that the 'footnote' points have no merit should be examined carefully by this tribunal before deciding such important issues. The petition for certiorari should be granted.

Respectfully submitted,

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